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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No: 398

ARTHUR K. WURDEMANN AND WURDEMANN-HJELM CORPORATION,

Petitioners,

vs.

CLIFFORD R. HJELM, DAVID R. HJELM AND THE JESMER CORPORATION,

Respondents.

(And three other cases consolidated for trial.)

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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To The Honorable Supreme Court of the United States:

Arthur K. Wurdemann and Wurdemann-Hjelm Corporation pray that a Writ of Certiorari issue to review the Orders and Judgment of the Supreme Court of the State of Minnesota, filed in the above-entitled actions on March 18, 1960, affirming two Orders for Judgment in the District Court for Ramsey County, Minnesota, on July 2, 1959, and July 10, 1959, and an Order and Judgment of the Supreme Court of Minnesota dated May 20, 1960, denying a Petition for Rehearing, pursuant to which Judgments were entered in said District Court on June 13, 1960, in favor of Respondents and against Petitioners.

CITATION TO OPINIONS BELOW

The four cases herein involved were consolidated and tried together by the District Court of Ramsey County, Minnesota, and it entered therein its Findings of Fact, Conclusions of Law and an Order for Judgment, dated December 4, 1958 (R. 58, f. 3, et seq.); and thereafter it entered two Orders dated July 2 and July 10, 1959 (R. 120, R. 124) denying Appellants' motion for amending findings or for a new trial (R. 84) and to have said case reopened for the taking of additional evidence (R. 106). Only one appeal was taken from both Orders, in Case No. 37916, and only one decision was rendered therein by the said Supreme Court. Three Judgments were thereafter entered in the District Court on both Orders, which were affirmed by, and pursuant to, the Mandates of said Supreme Court.

The Opinion of the State Supreme Court is reported in 102 N.W. (2) 811. A copy of the Opinion is hereto attached as Appendix A.

JURISDICTION

The Judgments sought to be reviewed were entered in the manner and at times as follows:

Opinion and Syllabus of said Supreme Court in the above-entitled actions affirming the said two Orders of the District Court for Ramsey County were rendered and filed on March 18, 1960; a Petition for Rehearing was filed on April 26, 1960, within the time allowed therefor; an Order denying the Petition for Rehearing was made and filed on May 20, 1960; and, by an instrument entitled Transcript of Judgment, an Order affirming the said Orders of the District Court was made and filed on May 20, 1960; the Mandates of said Supreme Court, directed to said District Court directing it to enter Judgments on its said Orders, were issued and transmitted to said District Court on May 31, 1960; an Order for

final Judgment was made and filed by the trial judge of said District Court, the Honorable R. E. Hachey, on June 7, 1960; and final Judgments pursuant to said Mandates of the Supreme Court and Order of the District Court were entered on June 13, 1960.

The jurisdiction of this Court is invoked under Title 28, Section 1257, U.S.C.A., subdivision 3.

QUESTION PRESENTED

1. Whether it is due process of law under the 14th Amendment to the United States Constitution for a State Supreme Court, exercising jurisdiction on appeal from one of its subordinate Courts, to invert many material facts as certified to it by its subordinate Court and to supply non-existent facts, all decisive of the issues, in arriving at its decision, particularly when under the State Constitution, as construed by it, that Court in its appellate judisdiction can only consider, and is limited to, the facts as certified to it by the record on appeal.

CONSTITUTIONAL PROVISION OF STATE, AND CONSTRUCTION THEREOF BY STATE SUPREME COURT

The State of Minnesota Constitution (Minnesota Statutes Annotated, Volume 2), Article 6, Section 2. *Supreme Court; Jurisdiction and Powers.*

> "It shall have original jurisdiction in such remedial cases as may be prescribed by law, and appellate jurisdiction in all cases, both in law and equity, but there shall be no trial by jury in said court • • •"

The Minnesota Supreme Court, in repeated decisions, has held that this Constitutional provision makes it mandatory that "appeals, therefore, must be decided solely upon the evidence actually presented to the trial court, and shown by the record on appeal".

Holtzberg v. Bommersbach, 235 Minn. 553, 51 N.W. (2) 586;

Moose v. Vesey, 225 Minn. 64, 29 N.W. (2) 649.

FEDERAL CONSTITUTIONAL PROVISION

The Constitution of the United States (United States Code Annotated, Constitution), AMENDMENT XIV, Section 1.

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

Minnesota Statutes Annotated, Volume 36, Section 566.03. *Recovery of Possession.*

"When any person holds over lands or tenements * * * after termination of contract to convey the same, or after terminination of the time for which they are demised or let to him or to the persons under whom he holds possession, or contrary to the conditions or convenants of the lease or agreement under which he holds, or after any rent becomes due according to the terms of such lease or agreement, * * * in all such cases the person entitled to the premises may recover possession thereof in the manner hereinafter provided."

Minnesota Statutes Annotated, Volume 36, Section 566.06. *Complaint and Summons.*

"The person complaining shall file a complaint with a justice of the peace, describing the premises of which possession is claimed, stating the facts which authorize the recovery, and praying for restitution thereof. The justice shall thereupon issue a summons, directed to the sheriff or any constable of the county, commanding him to summon the person against whom such complaint is made to appear before him on a day and at a place in such summons named, which shall not be less than three,

nor more than ten, days from the day of issuing the same. A copy of the complaint shall be attached to the summons, which shall state that it is so attached, and that the original has been filed."

Minnesota Statutes Annotated, Volume 36, Section 559.21. *Notice to terminate contract of sale; service and return; reinstatement of contract* (referred to in paragraphs numbers 1 and 2 of the Opinion of the State Supreme Court).

"When default is made in the conditions of any contract for the conveyance of real estate or any interest therein, whereby the vendor has a right to terminate the same, he may do so by serving upon the purchaser, his personal representatives or assigns, either within or without the state, a notice specifying the conditions in which default has been made, and stating that such contract will terminate 30 days after the service of such notice unless prior thereto the purchaser shall comply with such conditions and pay the costs of service. Such notice must be given notwithstanding any provisions in the contract to the contrary. * * *

* * * * *

"If, within the time mentioned, the person served complies with such conditions and pays the costs of service, the contract shall be thereby reinstated; but otherwise shall terminate."

Minnesota Statutes Annotated, Volume 36, Section 566.09. *Judgment; fine; execution.*

"If, upon the trial, the justice or jury find the defendant or any of several defendants guilty of the allegations in the complaint, the justice shall thereupon enter judgment that the plaintiff have restitution of the premises, and tax the costs for him * * *. The justice shall issue execution in favor of the plaintiff for such costs, and also issue a writ of restitution. If the justice or jury shall find that the defendant is not guilty as aforesaid, he shall enter judgment for the defendant, tax the costs against the plaintiff, and issue execution therefor."

Such judgment, as construed by the Minnesota Supreme Court, "determines only the right to the present possession,

and is not a bar to an action involving the title or equitable rights of the parties. Such matters cannot be litigated in such action."

Keller v. Henvit, 219 Minn. 280, 18 N.W. (2) 544.

And "a judgment in which does not constitute a bar in subsequent actions as to the question of title or other equitable defense."

Pusher v. Dale, 242 Minn. 564, at 568-569, 66 N.W. (2) 11;

Wm. Weisman Holding Co. v. Miller, 152 Minn. 330, 188 N.W. 732.

STATEMENT

On December 31, 1954, Respondent The Jesmer Company and Respondents Clifford R. Hjelm and David R. Hjelm, his brother, executed two instruments simultaneously and as part of the same transaction (R. 832, f. 3).

One of these instruments, Exhibit A, is in the form of a lease; and by it, The Jesmer Company leases to the Hjelm brothers the Piedmont Apartments in St. Paul, Minnesota, comprising some 150 apartments, some furnished, for a period of 10 years, beginning January 1, 1955, and ending December 31, 1964, at a monthly rental of $4,500, payable in advance on the 10th of each month, beginning with January 10th, 1955, up to and including December 10, 1964.

By the other instrument, Exhibit B, The Jesmer Company agrees to sell the Piedmont Apartments to the Hjelms, if they did three things:

(1) If they conveyed three pieces of real estate therein described and valued at $20,000 (R. 240, f. 1) to The Jesmer Company.

(2) If the Hjelms performed all the convenants of Exhibit A, including the monthly payments above described,

and which convenants the Hjelms, by the terms of Exhibit B, obligated themselves to perform.

(3) If the Hjelms paid The Jesmer Company the sum of $100,000 during the period commencing with December 20, 1964, or 11 days before the expiration of the lease, and ending a year thereafter, or on December 20, 1965. The payment of this $100,000 is nominally optional, and may be paid during said period either in a lump sum or in monthly installments of $5,000, plus interest at 5% on deferred payments.

Exhibit A contains no reference whatsoever to Exhibit B, nor to any of its terms.

Exhibit B refers to the terms of Exhibit A, and provides that "in the event the lease hereinbefore mentioned has been terminated prior to its expiration, this option shall be in all things null and void."

The Hjelms, pursuant to Exhibit B, conveyed the three pieces of real estate to The Jesmer Company, which sold them for $17,000 (R. 238, f. 2; R. 547, f. 1), and they were put into possession of the Piedmont Apartments on January 1, 1955, and remained in possession thereof, as sole owners and managers, until July 1, 1956, at which time they entered into an agreement, Exhibit D, by which the Wurdemann-Hjelm Corporation was agreed to be, and was, formed under the laws of Minnesota on August 29, 1956, and to which the Hjelms agreed to transfer their interest in said Piedmont Apartments, and in which corporation the capital stock was divided 50% to the Hjelms and 50% to Arthur K. Wurdemann; but the Hjelms continued in charge of said Apartments, performing the same services as before, but as officers of the corporation (R. 383, f. 2).

While they were so acting, Clifford R. Hjelm deposited some of the rents received in his own bank account; he testified that there is no way to determine how much was so de-

posited because it was "not his practice to identify on his deposit slips where the money came from" (R. 402, f. 2).

In April, 1957, Petitioners brought an action in Ramsey County District Court, No. 298591, against the Hjelms and The Jesmer Company alleging the agreement of July 1, 1956, Exhibit D, charging that Exhibits A and B were intended as a sale, and charging the misappropriation of the rents by the Hjelms and a conspiracy by Respondents to sell the property and to deprive Petitioners of their interests therein (R. 30 to 33).

On April 16, 1957, Exhibit H was executed by the Hjelms, assigning their interest in that corporation to Arthur K. Wurdemann and transferring their stock in said corporation to him in consideration of the assumption by him of $15,000 of personal debts of the Hjelms and $20,000 of said corporation's debts (R. 194, ff. 2-3); and the Hjelms thereupon moved out of the Piedmont Apartments on April 17, 1957 (R. 383, f. 2).

On June 4, 1957, The Jesmer Company brought an unlawful detainer action in the Justice Court of the City of St. Paul, Minnesota, against the Hjelms and the Petitioners for restitution of said premises for alleged breaches of the terms of said Exhibit A. (Jesmer's Exhibit 4 and Petitioners' Exhibits M and N.)

Exhibit A, the lease, contains two provisions with reference to the Right of Re-entry for Breach of Covenants:

a. Right of re-entry without forfeitures of the rents to be paid and the covenants to be performed by the lessees.

b. Right of re-entry upon written notice to lessees, declaring the lease forfeited.

The original complaint, filed on June 4, 1957, and the amended complaint, filed on June 27, 1957, both of which were filed with the Justice Court in accordance with the

Minnesota Statute, Section 566.03, did not claim any written notice of forfeiture, and it was admitted by Jesmer that the action was brought "without any warning, notice of any kind, conversation, or otherwise." (R. 529, f. 2). The complaints alleged only various breaches of covenants, and merely demanded restitution of possession.

Upon the bringing of the unlawful detainer action, Petitioners then brought an action against The Jesmer Company in the District Court of Ramsey County, No. 300857, (R. 38) for a Declaratory Judgment that Exhibits A and B constituted a sale and not a lease.[1]

While the unlawful detainer action was pending in the Justice Court, Jesmer secretly negotiated a secret agreement, Exhibit BB, dated June 29, 1957, with the Hjelms, which provided that The Jesmer Company would pay $7,942.42 on certain bills of the Hjelms, and that if The Jesmer Company won the then pending Justice Court case against the Hjelms and the Petitioners, the Hjelms would not be obligated to repay that sum; and, further, that if The Jesmer Company won that case and the parties "can't work out a deal" by which the Hjelms would repurchase the apartments, The Jesmer Company would pay other personal bills of the Hjelms and corporate bills, aggregating between $20,000 and $23,000, specified in said Exhibit BB. The above sums were, in fact, subsequently paid by The Jesmer Company, as evidenced by Agreement dated October 7, 1959, Exhibit CC.

The Hjelms and Petitioners were represented in said Justice Court case by the same attorney, John A. Miller; Clif-

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[1]Under Minnesota law, a Justice Court has no jurisdiction to determine title to land, nor to entertain equitable defenses; and its judgment, even if it decided rightly on the law, is no bar to a subsequent action involving title or equitable defense.

Bassett v. Fortin, 30 Minn. 27.
Wm. Weisman Holding Co. v. Miller, 152 Minn. 330, 188 N.W. 732.
Pusher v. Dale, 242 Minn. 584, 66 N.W. (2d) 11.

ford Hjelm was subpoenaed by The Jesmer Company and there cross-examined as an adverse witness; when Mr. Miller, the attorney for both the Petitioners and the Hjelms, wanted to withdraw as the Hjelms' attorney, Mr. Ames, attorney for The Jesmer Company, successfully objected that it was "highly unethical" for Mr. Miller to withdraw (R. 472, f. 2); Clifford Hjelm objected that if Mr. Miller was permitted to withdraw he, Clifford, wanted an attorney, although both Clifford and Ames knew that Exhibit BB had already been executed and that Clifford had a copy of it in his possession (R. 468, f. 3). The existence of Exhibit BB was kept entirely secret during the trial of the Justice Court action (R. 399, f. 3; R. 400, f. 1).

The case was tried in Justice Court from July 11th to July 16th, 1957; Petitioners were found "guilty" by the Justice Court; and after judgment for restitution, Petitioners were ousted from possession on September 13, 1957.

On discovering the fraud, Petitioners brought the action in District Court of Ramsey County, No. 300734: to set aside the Justice Court Judgment for extrinsic fraud, under *Street v. Alden*, 62 Minn. 160, 64 N.W. 157; alleged that Exhibits A and B constituted a contract for sale, which had been partly performed, [2] and had never been cancelled by written notice, in accordance with Section 559.21, supra; that the Justice Court had no jurisdiction to determine title or equitable jurisdiction; and that if Exhibit A was, in fact, a lease, it had not been terminated or forfeited by notice, as therein provided.

The three actions above described, Nos. 298591, 300758 and 300734, together with another action, No. 300807, brought by

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[2]The action in Justice Court was brought after Petitioners and their assignors, the Hjelms, had made 29 payments of $4,500 each up to and including May, 1957, aggregating $130,500, besides the first payment of $20,000 in land contracts, or a total of $150,500 in performance of their obligation undertaken under Exhibit B.

The Jesmer Company against Petitioners after their ouster to recover past due rents, were consolidated for trial.[3]

The District Court made findings that the instruments, Exhibits A and B, did not constitute a sale, but were a lease and option; that in violation of the lease, Petitioners permitted liens to be filed without paying for same or giving bond therefor to protect lessors; and that the judgment of the Justice Court was a bar to the present action.

Petitioners made a motion for amended findings or for a new trial, and also made a motion, under Rule 59 of the Rules of Civil Procedure for the District Courts of Minnesota, on the ground of newly discovered evidence and also that, since this was a trial by the Court without a Jury, the Court take additional testimony, given by David R. Hjelm, one of the parties to said Exhibits A and B, at a subsequent trial on May 4, 1959, in the Federal District Court for the District of Minnesota, in which David R. Hjelm testified that he and Clifford R. Hjelm had this lease-option agreement, Exhibits A and B, drawn by attorneys Cummins and Stacker; and that

> "it was the way they said it should be handled. I mean, Mr. Jesmer wanted to sell us * * *. It was a reduced option. The figure was set at * * * as if we were making contract payments all those years. It was amortized down. So the attorney said it was the same as buying it on contract, but that it was from some technical tax point of view, it would be better for Mr. Jesmer if we handled it that way, and I trusted the attorney." (R. 117, ff. 2-3),

and also take additional testimony which had been presented in said subsequent trial to the effect that said Clifford R. Hjelm had, in his written Application to the Chicago-Lake

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[3]At a pre-trial conference, it was decided that the Court would first determine the instruments in question, whether they amounted to a sale or a lease with an option, the question of fraud, and the other issues raised by the pleadings, except for any accounting between the parties, which accounting was left for subsequent proceedings.

State Bank of Minneapolis for an F.H.A. Loan (R. 111), represented (1) that he was the owner of said Piedmont Apartments, (2) that the date of purchase was December 31, 1954, and (3) that the purchase price paid was $450,000 (R. 111); and that the said Clifford R. Hjelm, in his written application to the American National Bank of St. Paul, Minnesota, for an F.H.A. loan, represented that he was the owner of said Piedmont Apartments and that its value was $500,000 (R. 114).

The motion for a new trial and the motion to take this additional testimony was denied; and Petitioners appealed to the Supreme Court on a settled case, certified by the trial Court, containing the evidence at the trial, as well as the above proffered testimony of David R. Hjelm and said written applications for F.H.A. loans of Clifford R. Hjelm.

REASONS FOR GRANTING WRIT AND ARGUMENT

To uphold the District Court and the Justice Court Judgments, the State Supreme Court recited in its Opinion, without any warrant in the record on appeal, and in direct contradiction thereto:

1. That Exhibit BB, dated June 29, 1957, provided that

> "if Hjelm would provide a buyer for [illegible]mer Corporation's vendor's interest in the Pied[illegible]t Apartments, part of the money received would be used to discharge certain personal obligations of Hjelm;"

when the certified record showed that Exhibit BB actually provided that The Jesmer Company agreed to pay (and actually did pay) for Clifford Hjelm, on his personal debts, the sum of $7,942.42, conditioned that said sum would not have to be repaid if The Jesmer Company won the said unlawful detainer case; the record further showed that the payment of, and agreement to pay, said money had nothing to do

with any proposed sale of the Piedmont Apartments or of The Jesmer Company's interest therein.

The fraudulent purpose of Exhibit BB is shown on its face. Ralph Stacker, who acted as attorney for the Hjelms in negotiating and drafting Exhibit BB and attending to its execution (R. 848 and 849), who was a witness for respondents at the trial of this case, testified on direct examination that the interests of the Hjelms on the one hand and Petitioners on the other were adverse in the unlawful detainer action (R. 927, f. 2); and further testified on cross examination as to the character and effect of Exhibit BB as follows:

> "Q. I am asking you to assume you were the party defendant in the place of Wurdemann and your co-defendant goes ahead and makes a secret contract with the plaintiff of the nature that is described in this contract, how would you be affected? I am asking you, isn't it a fact that you would feel you would be affected by this contract?
>
> A. Sure, he was affected.
>
> Q. You knew as a lawyer, didn't you, and you're smart enough to know—
>
> A. Yes.
>
> Q. That when a person signs a contract like this, that is evidence all his testimony might be influenced?
>
> A. You bet.
>
> Q. Yes.
>
> A. You bet I know that." (R. 900, f. 2, and R. 901, f. 1)

Yet the opinion of the Supreme Court fails to make any reference to this material evidence.

2. That "Jesmer did not know, when he signed Exhibit BB, that Clifford Hjelm would testify at the unlawful detainer trial." The record on appeal showed that The Jesmer Company's witness, attorney Ralph Stacker, who drew and negotiated Exhibit BB, testified on direct examination by Mr. Ames, attorney for The Jesmer Company, that

"Prior to that Saturday, June 29th, before the signing of Exhibit BB I told you and Jesmer *what* Cliff would testify to;" (R. 853, f. 1)

and Mr. Stacker further testified that he thought that the reason Jesmer was willing to sign Exhibit BB was that "he didn't trust Cliff to the last moment." (R. 900, ff. 1-3).[4] Clifford Hjelm had been subpoenaed by The Jesmer Company as an adverse witness at said trial (R. 397, f. 2).

3. That our motion to have the District Court take the above quoted testimony of David R. Hjelm, and to consider the written applications for F.H.A. loans of Clifford R. Hjelm, given in the United States District Court, after the trial of the above cases, was an attempt to prove that

"since the action was tried, Clifford Hjelm had been convicted of making false statements in F.H.A. applications,"

whereas the motion was obviously for the purpose of introducing newly discovered evidence to demonstrate that both

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[4]The obvious purpose of Exhibit BB was to keep Clifford from disclosing that the purpose of Exhibits A and B was a sale for $450,000 plus interest on deferred payments at 5%; which evidence would have prevented The Jesmer Company from terminating the contract without written notice; and the Supreme Court, without a word to sustain it in the record, found that Jesmer didn't even know that Clifford would testify.

The "amortized option price" that David R. Hjelm testified to in Federal Court was probably arrived at as follows:

Sale price	$450,000.00
Interest on deferred payments	140,101.95
Taxes plus insurance premiums (R. 874, f. 3)	66,000.00
Total payable	$656,100.95

This was to be paid under Exhibits A and B:

By a credit for real estate contracts	$ 15,000.00
By 120 payments of $4,500 each	540,000.00
By last payment of	100,000.00
	$655,000.00

The difference of $1,100.95 arose because it was found the real estate contracts brought Jesmer more than $15,000 (R. 238, f. 2; R. 547, f. 1).

Hjelms had understood, interpreted and represented Exhibits A and B to constitute a sale.

4. That the insurance provisions contained in Exhibit A, the lease, provided that "in the event of total loss, the land was to be conveyed to the lessees," whereas the uncontradicted record on appeal showed the testimony of both Mr. Stacker, as witness for The Jesmer Company, and Clifford Hjelm to be that, of the $500,000 insurance carried in case of total loss, The Jesmer Company and its mortgagee were to get only $100,000, plus $3,000 for each unexpired month of the lease, and that the balance of the $500,000, *plus the land,* would go to the lessees (R. 404, f. 3; R. 869 to 871). Such testimony is consistent with the provisions of said Exhibit A.

5. That lessees violated the alleged convenant in said lease, Exhibit A, which provided that "lessees would promptly discharge (mechanics' liens) or furnish a bond to protect the premises." The Supreme Court left out of the quoted provision the words "before foreclosure." The record on appeal showed that the first and only lis pendens (required to be filed under Minnesota law on commencement of foreclosure) was filed January 31, 1958, *or three and one-half months after Petitioners were ousted from the premises by the judgment of the Justice Court* (R. 679, f. 3).

6. That Jesmer learned of the assignment of Exhibits A and B to the Wurdemann-Hjelm Corporation in May, 1957, whereas Jesmer himself testified, according to the record on appeal, that he saw Exhibit D, by which the assignment to the corporation was made, not later than in December of 1956 or February, 1957 (R. 488, ff. 2-3); and that with such knowledge he accepted the corporation's check for the April, 1957, payment of $4,500, Exhibit V, bearing the notation that it was paid by said corporation (R. 161, f. 2), and ac-

cepted the May 10, 1957, payment (R. 190, f. 3) from Petitioner Arthur K. Wurdemann on May 13, 1957."[5]

7. That the agreement of April 16, 1957, Exhibit H, by which the Hjelms assigned all their interest in said corporation to Arthur K. Wurdemann, "expressly provided that the operation of the Piedmont Apartments would be in the Hjelms' name," whereas said agreement actually provided that "if the assignment was ineffective, the operation could be made in the Hjelms' name;" and there is no evidence that it ever was so operated, according to the record on appeal.

8. That in its Opinion, the State Supreme Court expressly approves and affirms the District Court's finding of fact that the lease, Exhibit A, was terminated, whereas the record on appeal shows, without contradiction, that Exhibit A was never terminated by written notice, as required by its terms, and that both the complaints and judgment in Justice Court showed affirmatively there was no such claim made or decided. The Supreme Court, in its Opinion, holds that a Judgment in Justice Court is conclusive of the facts pleaded in plaintiff's complaint. Obviously, the judgment of restitution could not be conclusive on the question of termination when termination in the manner provided by the lease was neither pleaded nor proved, and when the record on appeal affirmatively showed the unlawful detainer action was brought without notice of any kind (R. 529, f. 2).

9. That Petitioners' motion to have the Court take the further evidence, consisting of David R. Hjelm's testimony at the federal trial and said applications for F.H.A. loans of Clifford R. Hjelm, under our Rules of Civil Procedure, was a

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[5]In *Kenny v. Seu Si Lun*, 101 Minn. 253, 112 N.W. 220, the Minnesota Supreme Court held: "The receipt of rent by that name, accruing after the occurrence of causes of forefeiture under the terms of a lease for a definite term, to the knowledge of the lessor, bars his right of entry for condition broken" and that, even if the landlord makes a verbal reservation, "what he did, and not what he said, is the all important matter."

motion for a new trial and was made to show the criminal conviction of Clifford R. Hjelm, whereas the record showed that it was made to show that the $100,000, referred to in Exhibit B, was not the purchase price, but was the amortized balance of the purchase price agreed on after all of the prior payments had been credited on the agreed purchase price; and, yet, the Court, in its Opinion, states that "nowhere except in Exhibit B is there any evidence of an agreed purchase price."

10. Although the State Supreme Court held in *Gassert v. Anderson*, 201 Minn. 515, at page 517 (276 N.W. 808), (which case has never been overruled or modified) where the existence of an option was dependent on the existence of an accompanying lease, that

> "We cannot agree, as is contended by defendant, that any breach of the lease on the lessee's part, even if sufficient to justify termination thereof, would ipso facto cancel it."

Yet, in the present case, the Supreme Court held that the breach of the lease terminated the option, although the record on appeal shows that neither the complaints nor the judgment in the unlawful detainer case either alleged or claimed termination.

We filed a Petition for Rehearing which, although unopposed, was denied without opinion.

We pointed out in our Petition for Rehearing that these inversions of the evidence and the supplying of facts not in the record were contrary to Article 6 of the State Constitution as construed by *Holzberg v. Bommersbach*, 235 Minn. 553, 51 N.W. (2) 586 (see also *Moose v. Veacy*, 225 Minn. 64, 29 N.W. (2) 649) that "appeals must be decided solely upon the evidence actually presented to the trial Court and shown by the record on appeal," and that in basing its decision on a state of facts not shown by, and exactly contrary to,

the record on appeal, it denied us due process of law under the 14th Amendment to the United States Constitution.

This was the first opportunity to raise the federal question.

In *Brinkerhoff v. Faris Trust & Savings Co.*, 281 U.S. 673, 50 S. Ct. 450, it was held

> "While it is for the State Courts to determine the adjective as well as the substantive law of the State, they must in so doing accord the parties due process of law. Whether acting through its judiciary or legislature, a State may not deprive a person of all existing remedies for enforcement of a right which the State has no power to destroy."

In *St. Joseph Stock Yards Co. v. U. S.*, 298 U.S. 38, 56 S. Ct. 720, it was held:

> "The inexorable safeguard which the due process clause assures is * * * that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were followed."

In *Rockin v. California*, 342 U.S. 165, 72 S. Ct. 205, it was held:

> "The vague contours of the due process clause do not leave judges at large. In each case, due process of law requires 'an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims.' "

In *Loeb v. Trustees of Columbia*, 179 U.S. 472, 21 S. Ct. 174, it was held:

> "The federal courts in determining contract rights as affected by a state constitution, will enforce the contract in accordance with the state constitution, as interpreted at the time the contract was made by the highest court of the state, without regard to a contrary interpretation made after such contract was made."

We submit that the misquotations and omissions in this case by the State Supreme Court are not episodical, but are "so gross as to be impossible in a rational administration of justice," as set forth in

Chicago Life Ins. Co. v. Cherry, 244 U.S. 25, 37 S. Ct. 492, 493.

When the State Supreme Court in its Opinion says that "the findings of the trial Court on disputed questions are entitled to the same weight as a jury verdict," it ignores the fact that *on none of the issues in this case* is there any dispute in the evidence, and that the only dispute that exists is between the evidence certified and shown by the record on appeal and the evidence recited by the Court in its Opinion.

In Anglo-American law, it has always been considered not civilized procedure to ignore the record and apply abstract principles of law to facts nowhere appearing in, and directly contrary to, the record of the trial Court.

The entire point of the age-old requirement of written opinions of Judges,[6] as well as of Article 6 of the Minnesota Constitution, as interpreted by the Minnesota Supreme Court itself, points to that conclusion; and it is submitted, respectfully, that the due process clause of the 14th Amendment is satisfied with nothing less.

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[6]See *Rockin v. California*, 342 U.S. 165, 72 S.Ct. 205, supra, at page 208, note 4:

"Your committee do not find any positive law • • • but the course hath been so general and so uniform, that it must be considered as the law of the land."

And Burke had an answer for those who argued that the liberty of the citizen cannot be adequately protected by the flexible conception of due process of law:

"English jurisprudence has not any other sure foundation, nor consequently the lives and properties of the subject any sure hold, but in the maxims, rules and principles, and juridical traditionary line of decisions. • • •"

CONCLUSION

It is urged that the facts in this case clearly demonstrate that the State of Minnesota, through its judicial processes, has deprived Petitioners of their property without due process of law and has denied to them the equal protection of its laws; that without the omissions and inversions of facts certified by the trial court, and without the supplying of other facts not so certified and not in the record, as hereinabove shown, the decision of the Minnesota Supreme Court would have been legally impossible; and that the facts herein disclose a case which is clearly within the Rules of this Court authorizing the issuance of a writ of certiorari and that a writ should be granted.

Wherefore, the Petitioners pray that a writ of certiorari directed to the Supreme Court of the State of Minnesota issue in this case, and that upon a review by this Court, the judgment of said Supreme Court be in all things reversed and vacated, and that the case be returned for further proceedings in accordance with the views of this Court.

Respectfully submitted,

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APPENDIX A

No. 7 Ramsey County Murphy, J.

37916

ARTHUR K. WURDEMANN and WURDEMANN-HJELM CORPORATION,

Appellants,

vs.

CLIFFORD R. HJELM, DAVID R. HJELM and THE JESMER CORPORATION,

Respondents.

(And 3 other cases.)

SYLLABUS

1. In action for declaratory judgment to have a lease and option declared to be a contract for the conveyance of an interest in real estate a court will consider the transaction as a whole in light of existing circumstances in order to ascertain the true nature of the relationship created by the agreements, and neither the form of the instruments creating the relationship nor the names which the parties have given them will govern that determination.

2. An option to purchase real estate is merely a privilege given by the owner of the property to another to buy the property at his election. The optionee is not obligated to purchase the property but is afforded the opportunity and privilege of doing so should he comply with the conditions by a certain time.

3. A contract of sale of an interest in real estate, on the other hand, must be bilateral in its obligation and if the contract binds one party to sell and the other party to purchase for a stipulated price then it is a contract of sale and purchase, the minds of the parties having met on the proposition and both having assented thereto; but if it gives to the second party the mere privilege of buying the property if he chooses, it is an option.

4. An action charging conspiracy to defraud one of an interest in real estate presents a fact question and where the findings of the court are based upon conflicting evidence they will not be disturbed on appeal unless manifestly and palpably contrary to the evidence as a whole. The findings of the trial court on disputed questions are entitled to the same weight as a jury verdict and will not be upset merely because an appellate court might view the evidence differently.

5. A judgment in favor of the landlord in an unlawful detainer action is conclusive between the parties as to the existence and validity of the lease, the occupation of the tenant, and the facts alleged in the complaint which forms the basis of the action.

6. Where a lease and option agreement constitute a part of one entire contract and the lessee-optionee agrees to perform the provisions of the lease as a condition precedent to the exercise of the option, the breach of the lease amounts to a failure of consideration for the option to purchase and when the lease fails because of breach of the covenants by the lessee the accompanying option fails with it.

7. Upon the facts set forth in the opinion there was no abuse of the trial court's discretion in denying motion for a new trial based upon newly discovered evidence.

Affirmed.

OPINION

MURPHY, Justice.

This is an appeal from an order denying plaintiffs' motion for amended findings or for a new trial. The trial court had found that certain agreements entered into between the plaintiffs' assignors and defendant Jesmer Corporation were a lease and option to purchase and not an agreement for the purchase and sale of an interest in real estate. It further found, contrary to the contentions of the plaintiffs, that the lease and option were effectively terminated for breaches of several covenants contained in the lease and that the termination of the lease was not a result of an unlawful conspiracy among the defendants to defraud plaintiffs. This is also an appeal from an order denying a request to permit

certain testimony to be introduced or for a new trial on the basis of certain newly discovered evidence not available at the time of the trial.

This case involves a number of complicated agreements and transactions. It is unnecessary to record here in detail all the facts developed in the many hundreds of pages of testimony in the official record. Briefly summarized, the salient facts are these: On December 31, 1954, the Jesmer Corporation and defendants Clifford R. Hjelm and David R. Hjelm entered into two agreements denominated "INDENTURE OF LEASE" and "option." Under the first agreement the Hjelms leased from the Jesmer Corporation the Piedmont Apartments located in St. Paul for a period of 10 years from January 1, 1955, at a monthly rental of $4,500. The lessor agreed to pay all personal and real property taxes, except that if they exceeded $4,700 in any year the lessees were to pay the excess. The lessor agreed to carry public liability insurance in specified amounts and $500,000 of fire and tornado insurance on the property, but the lessees were to reimburse the lessor for premiums in excess of $1,900 in any year. In the event of damage by fire rendering the premises unfit for the conduct of the lessees' business the lease could be terminated by either party, unless the damage could be repaired within 6 months, in which case the lessees were to repair the premises and the lessor's insurance proceeds were to be made available for those expenses. In the event of total loss the land, independent of buildings, was to be conveyed to the lessees. Covenants in the lease provided that the lessees would not sublet the property without the consent of the lessor, except in units in the ordinary course of their business;[1] that the lessees would not permit mechanics liens to attach to the premises without promptly discharging them or furnishing to the lessor a sufficient bond to protect the premises from the liens; that at least one of the two lessees would personally occupy the premises during the entire term of the lease, unless prevented from doing so by causes beyond his control; that no defective condition would be allowed to exist on the premises in violation of any city ordinance; and that if the lessees failed to keep or perform

[1] It was apparently the understanding of the parties that this covenant prohibited assignment of the lease.

any of the lease covenants, the lessor could elect either to reenter without working a forfeiture of the rents to be paid and covenants to be performed under the lease or to terminate the lease on written notice to the lessees.

Under the second agreement the lessees were given an option to purchase the leased premises for $100,000, provided all the terms of the lease had been fully complied with. In return for this option the lessor was given title to certain contracts of an agreed value of $20,000, which the Jesmer Corporation sold for $17,000. These two agreements were filed in the office of the registrar of titles, although no registration tax was paid on filing.

There was testimony by Mr. J. Lisle Jesmer that in 1954, the year prior to the lease, the gross rental receipts from the Piedmont were $81,645.98, and that the expenses, excluding insurance and taxes, were $38,302.21. There was also testimony by Clifford Hjelm that his "understanding" was that the rental receipts were $7,500 to $8,000 per month (substantially more than the actual receipts) and that when he entered the lease agreement he believed he and his brother could operate the Piedmont more efficiently than the Jesmer Corporation had so that they could make a substantial profit over the monthly rentals and expenses. The value of the Piedmont was estimated by various witnesses at $400,000 to $500,000.

The Hjelms lived in and operated the Piedmont during 1955 and 1956. On their Federal and state income tax returns for 1955 the Hjelms listed the $4,500 monthly payments to the Jesmer Corporation as rent expense, and the company listed those receipts as rental income. During 1956 the company had difficulty collecting rents from the Hjelms and several of the checks received from them were returned marked "N.S.F." Since December 1956 the rent had never been paid on time. The Jesmer Corporation commenced separate unlawful detainer actions for nonpayment of rent for the months of December 1956, February 1957, March 1957, and April 1957.

During 1957 Jesmer and Clifford Hjelm held some unsuccessful negotiations intended to change the lease and option agreements into a contract for deed.

There was evidence that by April 1957 the lessees were

notified by the city architect's office that conditions existed on the premises in violation of the city's codes. During 1957 seven mechanics liens were filed against the Piedmont, although only two of these were filed before and remained undischarged on June 3, 1957, when the respondent, Jesmer Corporation, commenced an unlawful detainer action.

On April 16, 1957, the Hjelms entered into a written agreement with Arthur K. Wurdemann under which the Piedmont lease and option were assigned to the Wurdemann-Hjelm Corporation. This agreement expressly provided that the operation of the Piedmont would be in the Hjelms' name. Following this agreement the Hjelms moved out of the Piedmont on April 17, 1957. Since that time the Hjelms have transferred their stock in the Wurdemann-Hjelm Corporation to Arthur Wurdemann, and they no longer have any interest in the Piedmont. Mr. Jesmer learned of the assignmen in May 1957 and obtained a copy of it in June of that year.

On June 3, 1957, the Jesmer Corporation brought an unlawful detainer action in the Ramsey County justice court for breaches of lease covenants. The Hjelms, the Wurdemann-Hjelm Corporation, and Arthur Wurdemann were each named as defendants. On June 29, 1957, the Jesmer Corporation entered an agreement with Clifford Hjelm that if Hjelm would provide a buyer for the Jesmer Corporation's vendor's interest in the Piedmont Apartments part of the money received would be used to discharge certain personal obligations of Hjelm and also that if—but only if—the company were successful in repossessing the Piedmont Apartments Hjelm would be discharged from repaying such sums. Pursuant to this agreement the Jesmer Corporation also received a copy of the assignment agreement of April 16, 1957, between the Hjelms and Wurdemann. Mr. Jesmer testified, however, that the agreement was not made to induce Clifford Hjelm to testify falsely before the justice court. He did not know prior to the trial that Hjelm would testify.

The unlawful detainer action was tried in the justice court of Judge R. F. Ferguson, justice of the peace, before a jury, and resulted in a verdict and judgment for the Jesmer Corporation. A writ of restitution for return of the Piedmont Apartments to the Jesmer Corporation was ordered.

The plaintiffs here failed to appeal from that judgment within the time fixed by statute. In The Jesmer Co. v. Wurdemann-Hjelm Corp. 250 Minn. 485, 85 N.W.(2d) 207, this court made absolute a writ of prohibition restraining the municipal court from entertaining any appeal from the justice court judgment.

The plaintiffs in the present action then sought a writ of prohibition to restrain the justice court from enforcing the writ of restitution entered in the action. This court discharged the writ and held that the justice court had jurisdiction of the unlawful detainer action. The Jesmer Co. v. Wurdemann-Hjelm Corp. 250 Minn. 574, 85 N.W.(2d) 192.

On October 7, 1957, after the justice court judgment had been obtained, the Jesmer Corporation transferred a vendor's interest in certain real estate to Clifford Hjelm and agreed to discharge certain obligations of his. Hjelm, in return, released the company from its obligations under the June 29 agreement; agreed to pay certain financial obligations upon which liens could be filed against the Piedmont Apartments; and agreed to pay to the company rentals collected from Piedmont tenants during the last weeks of September 1957.

To outline the numerous claims and cross-claims asserted in the four consolidated actions would unduly extend this opinion and contribute nothing to an understanding of the determinative issues. It is sufficient to say that plaintiffs assert that they are the owners of the Piedmont Apartments; that they are unlawfully denied possession; and that they should have judgment declaring them to be the owners of the property and an accounting for rents collected by the Jesmer Corporation since it repossessed the property. They further ask that a temporary injunction issue enjoining the defendants from disposing of the property and that a receiver be appointed. They ask for a declaratory judgment establishing that the lease and option agreement were in fact a purchase and sale agreement for an interest in real estate. Defendant Jesmer Corporation claims that the plaintiffs are indebted to it for $18,000 as rent and it asserts a further claim in the amount of $25,000 alleging the plaintiffs have permitted waste on the property, have removed personal property, and have damaged the premises.

The trial court by its findings concluded: (1) That the agreement of December 31, 1954, between the Jesmer Corporation and the Hjelms was a lease and an option to buy at the termination of the lease; (2) that the terms of the lease were breached by assignment without consent of the lessor; by permitting liens to be filed against the property; by delinquency in rental payments; by failure to comply with city ordinances in making repairs and maintaining electrical installations; and by the removal of the lessees from the premises; (3) that the Jesmer Corporation had not waived any of such breaches and was entitled to restitution of the premises; (4) that the justice court had jurisdiction of the unlawful detainer action and its judgment granting restitution of the premises terminated the lease; (5) that there was no conspiracy between the defendants to defraud the plaintiffs; (6) that the Jesmer Corporation is in lawful possession of the premises and plaintiffs are not entitled to an accounting from the Jesmer Corporation. The court did not hear all of the evidence with reference to the financial transactions between the Hjelms and Wurdemann. The parties agreed that a determination of those issues would await the decision relative to the construction of the original lease and option and a determination on the issue of conspiracy.

1. The plaintiffs contend that the lease and option agreements between the Jesmer Corporation and the Hjelms can be cancelled only by notice pursuant to M.S.A. 559.21, which provides in part:

> "When default is made in the conditions of *any contract for the conveyance of real estate or any interest therein*, whereby the vendor has a right to terminate the same, he may do so by serving upon the purchaser, his personal representatives or assigns, either within or without the state, a notice specifying the conditions in which default has been made, and stating that such contract will terminate 30 days after the service of such notice unless prior thereto the purchaser shall comply with such conditions and pay the costs of service. *Such notice must be given notwithstanding any provisions in the contract to the contrary.* * * *
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> * * * * * *

> "If, within the time mentioned, the person served complies with such conditions and pays the costs of service, the contract shall be thereby reinstated; but otherwise shall terminate." (Italics supplied.)

The plaintiffs argue that the lease and option agreements simultaneously entered into between the Jesmer Corporation and the Hjelms constitute a contract for the conveyance of an interest in the Piedmont Apartments within the meaning of the statute. In determining the validity of this argument we must consider the transaction as a whole in light of the then-existing circumstances in order to ascertain the true nature of the relationship that was thereby created. Beecher v. Spain, 140 Minn. 255, 167 N.W. 793. Neither the form of the instruments creating the relationship nor the names which the parties have given them are to govern our determination. Beecher v. Spain, *supra;* Johnson v. Fitzke, 234 Minn. 216, 48 N.W.(2d) 37; 12 Am. Jur., Contracts, §27. The essential inquiry is after the nature of the obligations imposed on the parties.

2. The respondent contends that the agreements must be considered to create an option only, to which §559.21 is inapplicable, since there is no obligation on the lessees-optionees to pay the $100,000 and purchase the Piedmont at the end of the lease term. The authorities relied upon are Womack v. Coleman, 92 Minn. 328, 100 N.W. 9, and the following cases approving the rule of that decision: Pike Rapids Power Co. v. Minneapolis, St. P. & S. S. M. R. Co. (8 Cir.) 99 F.(2d) 902; Libby v. Parry, 98 Minn. 366, 108 N.W. 299; Ballard v. Friedman, 151 Minn. 493, 187 N.W. 518; and Moore v. Allen, 109 Minn. 139, 123 N.W. 292. The Womack case involved a contract under which one party agreed (92 Minn. 333, 100 N.W. 11)——

> "* * * that he will convey, or cause to be conveyed, the premises to the second party, by warranty deed, upon full performance by the second party [of payment of the stipulated price in the manner designated in the contract]. While the first party is bound to furnish the abstract, tender a good title, and cause the premises to be conveyed by a sufficient warranty deed, the second party was not obligated to make the remaining payments and accept the conveyance, even though a good and sufficient title be tendered."

The court held that contract to be an option not subject to the predecessor statute of §559.21.

The plaintiffs' reply brief states that the principal issue is whether the lease and option "constituted an agreement to sell or were merely a lease and option." Viewing the transaction in retrospect counsel for the plaintiffs, by a computation based upon gross income derived from the property less rentals and other expenses to be paid by the tenant under the terms of the lease, concludes that the tenant would be left with about $33,000 from which to pay an annual rental of $54,000 and argues "that no sane person would enter into a lease with that record, and pay $20,000 for that privilege, unless it had been agreed that part of the monthly payments were to be applied on the purchase price, and therefore added to the $100,000 designated as the purchase price under the option."

This argument boils down to the proposition that a court must by force of the character and effect of the agreements conclude that they constitute, in substance if not in form, a contract for the purchase of an interest in real estate. Plaintiffs claim that the total effect of the agreements indicates that the monthly payments were not in fact rental payments but installments on a purchase price and that as these payments continued during the term of the transaction the lessees were building up an equity in the property which would result in an economic compulsion which would necessarily require them at the termination of the agreement to exercise the option by the payment of $100,000, at which point they would acquire a property estimated in value at from $400,000 to $500,000. The difficulty with accepting this argument is that nowhere in the record aside from the option agreement can we find any evidence of a purchase price considered or agreed upon by the contracting parties nor have the plaintiffs furnished us with any authority to support the conclusion they ask us to reach. The plaintiffs rely primarily on In re City and County of San Francisco, 195 Cal. 426, 233 P. 965, and Mahoney v. City and County of San Francisco, 201 Cal. 248, 257 P. 49. It is readily apparent from an examination of these authorities that the transactions involved related to the purchase and sale of real estate. To circumvent constitutional restrictions with respect to the purchase of real estate by California municipali-

ties, the parties resorted to the mechanics of a lease and option to accomplish the acquisition of property. The California court correctly held that an agreement between parties to characterize the instrument as a lease cannot change its true character, and the evident intent and purpose of the makers as disclosed by the terms of the instrument must control.

We are asked by the plaintiffs to give an interpretation to the agreements before us which would ignore the expressed intention of the parties as set forth in the language contained in the agreements. It is well recognized that a court will not resort to construction where the intent of the parties is expressed in clear and unambiguous language but will enforce and give effect to the contract according to its terms, in the absence of fraud or other grounds affecting enforcement according to its terms.[2]

If we apply the well-recognized rules of construction we must necessarily come to the conclusion that the documents in question are in fact a lease and an option to purchase and nothing more. The plaintiffs do not contend that there is any ambiguity or uncertainty in the terms of these documents. We could only hold otherwise by ignoring the clear terms of these documents.

Among the numerous cases dealing with this issue is Vogt v. Ganlisle Holding Co. 217 Minn. 601, 15 N.W.(2d) 91, which case has to do with an earlier chapter in the strange history of this particular property.[3] Although it was not squarely dealt with there, the court had before it the same issue which is presented in this case. We there said that (217 Minn. 605, 606, 15 N.W.(2d) 93, 94): "Plaintiff was not obligated to purchase the property but was afforded an opportunity and privilege of doing so should he desire to comply with the conditions by a time certain." Citing various authorities we

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[2]Anderson v. Twin City Rapid Transit Co. 250 Minn. 167, 84 N.W. (2d) 593; Tynan v. KSTP, Inc. 247 Minn. 168, 77 N.W. (2d) 200; Phil G. Ruvelson, Inc. v. St. Paul F. & M. Ins. Co. 235 Minn. 243, 50 N.W.2d 629; Pierce v. Grand Army of the Republic, 224 Minn. 248, 28 N.W. (2d) 637; Oleson v. Bergwell, 204 Minn. 450, 283 N.W. 770; Union Sewer Pipe Co. v. Olson, 82 Minn. 187, 84 N.W. 756; 4 Dunnell Dig. (3 ed.) §§ 1816, 1817, 1831.

[3]It appears that in 1940 a mortgage was foreclosed on the Piedmont Apartments and sold at sheriff's sale for $11,000 although the property then had a market value of $100,000.

pointed out that an option is merely a privilege given by the owner of property to another to buy the property at his election. "It secures the privilege to buy and is not of itself a purchase. The owner does not sell his property; he gives to another the right to buy at his election." See, City of Minneapolis v. Republic Creosoting Co. 161 Minn. 178, 183, 201 N.W. 414, 416; Ferch v. Hiller, 209 Minn. 124, 295 N.W. 504; Martin v. Walker, 84 Minn. 8, 86 N.W. 467; Western Union Tel. Co. v. Brown, 253 U.S. 101, 40 S.Ct. 460, 64 L.ed. 803; 10 Dunnell, Dig. (3 ed.) §5404; 20 Id. §10016; 12 Am. Jur., Contracts, §27.

An option to purchase land does not before acceptance vest in the holder of the option an interest in the land. It appears, however, that there are some authorities which hold that because an option may be assigned and transferred and the optionee may have it enforced by specific performance it constitutes an interest in land.[4] In Knight v. Chamberlain, 6 Utah (2d) 394, 315 P. (2d) 273, it was held that a valid option to purchase is an interest in real estate within the meaning of the statute of frauds requiring such options to be in writing. We held to the contrary in Shaughnessy v. Eidsmo, 222 Minn. 141, 145, 23 N.W.(2d) 362, 365, where we said that a contract conferring an option to purchase vests in the optionee "only a right *in personam* to buy at his election."

3. A contract of sale, on the other hand, must be bilateral in its obligation and if the contract binds one party to sell and the other party to purchase the property for a stipulated price then it is a contract of sale and purchase, the minds of the parties having met on the proposition and both having assented thereto; but if it gives to the second party the mere privilege of buying the property if he chooses, it is an option. McCreight v. Girardo, 205 Ore. 223, 228, 287 P.(2d) 414. In Zora Realty Co. v. Green, 60 N.Y.S.(2d) 440, 445, it was said that a contract of purchase and sale is distinguished from an

[4]This appears to be on the theory that it gives rise to a contingent equitable interest analogous to an executory devise. See, 26 Harv. L. Rev. 747; 10 Mont. L. Rev. 70.

option in that a purchaser under the contract has not only the right to purchase but is obligated to do so.[5]

Of persuasive force in the consideration of this issue is the fact that the parties themselves considered the agreement a lease and option. The lease and option were filed by the lessees with the registrar of titles as a lease and option; the mortgage registry tax which would be required for filing a contract for deed was not paid. Of no small significance is the fact that the lessees deducted the rental payments as expense in their income tax return while the lessor reported the rent as income in its return. Moreover, it should be pointed out that before the lease was cancelled the lessees made efforts to have the lease and option placed on a contract for deed basis. The parties referred to the documents as a "lease" and an "option." During the course of five unlawful detainer proceedings, the instruments were treated as such by the parties. The plaintiffs' answer in the unlawful detainer action in justice court admits occupancy under the terms of the lease, and on at least one check for rental payment given by the plaintiff there was typed in above the line provided for Jesmer Corporation's signature a receipt for "rent" under the "lease."

We are of the view that the trial court was correct in holding that the documents constituting the agreement for lease and option did not constitute a contract for purchase of an interest in real estate.

4. It is next contended by the plaintiffs that the defendants Clifford Hjelm and the Jesmer Corporation conspired to defraud plaintiffs of their interest in the Piedmont Apartments. The trial court found against the plaintiffs on this issue. The plaintiffs now contend that the finding is in error. From an examination of the record as it bears upon the question of the alleged conspiracy to defraud it may be said that at first blush the acts and agreements of Jesmer and Clifford Hjelm suggest that they were salvaging their own interests at the expense of Wurdemann. An examination of the evi-

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[5]See, also, Johnson v. Kruse, 205 Minn. 237, 285 N.W. 715; Oleson v. Bergwell, 204 Minn. 450, 283 N.W. 770; State v. Crum, 70 N.D. 177, 292 N.W. 392; Cole v. Haynes, 216 Miss. 485, 62 So. (2d) 779, 33 A.L.R. (2d) 1378; 55 Am. Jur., Vendor and Purchaser, §29; Annotations, 3 A.L.R. 582 and 87 A.L.R. 566; 20 Dunnell, Dig. (3 ed.) §10016.

dence as a whole, however, supports the conclusions of the trial court,[6] who after a fair and careful review of the evidence decided that what transpired between Clifford Hjelm and Jesmer involved nothing more than what they had a legal right to do.[7]

It is an established rule that findings of fact based on conflicting evidence will not be disturbed on appeal unless manifestly and palpably contrary to the evidence as a whole. Since

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[6]In an appraisal of Jesmer's situation the trial court pointed out: "Jesmer had been put to the necessity of several unlawful detainer actions to collect rent. He could justifiably look forward to possibly 50 to 75 more over the next seven and a half years. Violations of municipal ordinances had not been corrected or remedied. Creditors were pressing for payment for work and materials furnished. Creditors had threatened to, and * * * actually did, replevy appliances used by various tenants. Rents of the tenants were garnished. Proceedings were about to be commenced to provide for a receivership to operate the business. Jesmer could justifiably foresee that he would soon suffer the loss of, or damage to, a substantial, successful going business. Restitution was the only procedure left for him. He commenced his unlawful detainer action early in June, alleging that Wurdemann or the Wurdemann-Hjelm Corporation has some interest or claimed interest in and to the lease. He had not yet learned of the full contents of the April 16th agreement * * *. Finally, on June 29th or shortly before; he agreed to the terms of * * * [the agreement of June 29] in return for the full contents of * * * [the April 16th agreement].

"On that date (June 29th) assuming he would get the business back, he realized that he would be obligated to pay substantial bills which Wurdemann, the Hjelms and the Wurdemann-Hjelm Corporation had incurred. There was no evidence that Clifford Hjelm could ever pay the bills. Having received a copy of * * * [the April 16th agreement], Jesmer knew that Wurdemann was liable for those bills. On June 29th Jesmer in effect told Clifford Hjelm that if he could sell one of Jesmer's contracts for deed, the proceeds would be applied on the Piedmont delinquent accounts, and further, that if Jesmer recovered possession of the Piedmont, the Hjelms would be relieved of the bills still owed, set forth in * * * [the April 16th agreement], which on June 29th amounted to a balance of approximately $23,000. On October 7th, after Jesmer took over the operation of the business, he and Clifford Hjelm entered into an agreement * * *, wherein the rights of the Hjelms were finally terminated in and to the Piedmont, and a further attempt was made to balance their accounts. Again, we must keep in mind that when * * * [the agreements of June 29 and October 7] were made, Jesmer was obligated to pay the delinquent accounts in the sum of approximately $23,000; Hjelms displayed no ability or possibility of making payment; and, though done in violation of the terms of the lease, Wurdemann and the Wurdemann-Hjelm Corporation, then owned solely by Wurdemann, had assumed ownership of the lease and the entire delinquent obligations. It could be said that the agreements were not prudent on the part of Jesmer, but they certainly are not, standing alone, proof of a conspiracy between Jesmer and the Hjelms."

[7]Harding v. Ohio Cas. Ins. Co. 230 Minn. 327, 41 N.W. (2d) 818.

the lower court is the trier of fact, its findings on disputed questions are entitled to the same weight as a jury verdict and will not be upset merely because this court might view the evidence differently. 1 Dunnell, Dig. (3 ed.) §411. We are of the view that the evidence fairly sustains the findings of the trial court on the question of conspiracy to defraud and they must be affirmed on that issue.

5. The plaintiffs further argue that the judgment of the justice of the peace was obtained by extrinsic fraud and should therefore be set aside and held void. It is unnecessary for us to labor this point further than to say that a judgment in favor of the landlord is conclusive between the parties as to the existence and validity of the lease, the occupation of the tenant, and the other facts alleged in the complaint which forms the basis of the unlawful detainer action. Here the complaint supporting the unlawful detainer action alleged various breaches of the lease including faulty electrical installations in violation of the city ordinances, permitting mechanics liens in amounts of $667.92 and $880.83 to attach to the leased premises, that the lessees vacated the premises in violation of the agreement to personally occupy the property during the full term of the lease, that the lease was assigned to the plaintiffs in violation of its terms, and that the plaintiffs refused to allow the lessor access to the premises for the purpose of examining and inspecting the same. In Ferch v. Hiller, 210 Minn. 3, 7, 297 N.W. 102, 104, this court considered the legal effect of a judgment in an unlawful detainer action for the restitution of real property and held that the judgment had a res judicata effect on subsequent litigation between the same parties. We said:

> "A judgment of restitution is conclusive not only of the right of possession but the facts upon which such right rested."

Accordingly the district court in this case was correct in considering as conclusive the justice court's determination that the lease covenants had been breached and that the breaches had not been waived by the lessor. Any challenge of those allegations would have to be made in an appeal from the judgment and the plaintiffs failed to take such an appeal.

6. The plaintiffs further argue that the judgment granting a writ of restitution in the justice court proceeding was not effective to destroy its rights under the option.

The option to purchase in the case before us is conditioned upon the performance by the lessees of "all of the terms and conditions" of the lease which had a date of expiration of December 31, 1964. Where as here the lease and option agreements constitute a part of one entire contract, the breach of the lease amounts to a failure of consideration for the accompanying option to purchase, so that when the lease fails because of a breach of the covenants by the lessees the accompanying option must fail with it. The contract together with the option expired upon reentry by the lessor. London v. Tebo, 246 Mass. 360, 141 N.E. 234, 29 A.L.R. 1037. Where the option gives the lessee the right to purchase during the term of the lease, the right must necessarily be exercised during the life of the lease. As was said in Thompson v. Coe, 96 Conn. 644, 650, 115 A. 219, 221, 17 A.L.R. 1233, 1237:

> "* * * No owner of premises would understandingly agree that a lessee should have the privilege of purchasing the premises during the term of a lease long after the lease had been forfeited. An agreement of that character would encumber the premises and in all likelihood prevent a sale or lease, or the making of improvements upon the owner's own premises."

In the case before us the agreement to abide by the provisions of the lease was made a condition precedent to the option to purchase. The right of the lessees to purchase the property depended upon the fulfillment of all of the covenants and provisions of the lease. Until they had paid the rent and complied with the other covenants of the lease they had under the contract no right of purchase. Crystal Lake Cemetery Assn. v. Farnham, 129 Minn. 1, 151 N.W. 418; Hafemann v. Korinek, 266 Wis. 450, 63 N.W.(2d) 835; 32 Am. Jur., Landlord and Tenant, §309; 51 C.J.S., Landlord and Tenant, §83.

7. The plaintiffs moved for a new trial on the basis of newly discovered evidence concerning the fact that since the action had been tried the witness Clifford Hjelm had been convicted of making false statements in applications for loans to the Federal Housing Authority. The plaintiffs contend the court erred in denying this motion. It is well settled in Minnesota that "A motion for a new trial on the ground of newly discovered evidence is addressed to the sound dis-

cretion of the trial court"[8] and the court's discretion is to be exercised sparingly.[9] In Briggs v. Chicago G. W. Ry. Co., 248 Minn. 418, 427, 80 N.W.(2d) 625, 633, this court also said that "if such [newly discovered] evidence is merely cumulative, contradictory, or impeaching of evidence adduced during the trial, a denial of a new trial is not an abuse of discretion." In the instant case the district court said in its memorandum:

> "• • • While this criminal proceeding in federal district court should and does have a bearing on the weight to be given to the testimony of such a person, the Court was cognizant of some of those proceedings at the time of trial, and it is now pointed out that the conclusion reached or arrived at by the Court was upon a full review of all of the evidence and all of the testimony of all of the parties, and the Court need not reiterate here the basis or reasons for its findings and conclusions.
>
> "Under the circumstances the Court feels that it cannot change its position because of a conviction of the defendant Hjelm for said violations."

It should be emphasized that this was not a jury trial and that the judge was, therefore, in a peculiarly good position to determine the probable effect of the newly discovered evidence on the findings of fact. Considering the nature of the new evidence offered and the careful consideration given to it by the district court, we cannot conclude that the court's refusal was a denial of a legal right or a manifest abuse of judicial discretion. Austin v. Rosecke, 240 Minn. 321, 61 N.W.(2d) 240.

Affirmed.

(Endorsed, filed March 18, 1960, Mae Sherman, Clerk, Minnesota Supreme Court.)

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[8]Austin v. Rosecke, 240 Minn. 321, 61 N.W. (2d) 240, 244.

[9]Schiro v. Raymond, 237 Minn. 271, 54 N.W. (2d) 329.

APPENDIX B

(Petition Denied)

STATE OF MINNESOTA

OFFICE OF CLERK OF SUPREME COURT

St. Paul, Minn.

May 20, 1960

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

MAE SHERMAN,
Clerk Supreme Court.

APPENDIX C

TRANSCRIPT OF JUDGMENT

STATE OF MINNESOTA, SUPREME COURT

Arthur K. Wurdemann and Wurdemann-Hjelm Corporation,
Appellants

vs. 37916

Clifford R. Hjelm and David R. Hjelm and The Jesmer Corporation,
Respondents

Wurdemann-Hjelm Corporation,
Appellant

vs. 37916

The Jesmer Corporation,
Respondent

The Jesmer Company,
Respondent

vs. 37916

Wurdemann-Hjelm Corporation and Arthur K. Wurdemann,
Appellants

Arthur K. Wurdemann and Wurdemann-Hjelm Corporation,
Appellants

vs. 37916

Clifford R. Hjelm, David R. Hjelm, and the Jesmer Company,
Respondents

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the orders of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Ramsey be and the same hereby are in all things affirmed.

And it is further determined and adjudged that respondent, The Jesmer Corporation herein, do have and recover of appellants herein the sum and amount of One Hundred Ninety-eight and 25/100 Dollars, ($198.25) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed May 20, 1960.

BY THE COURT

Attest: MAE SHERMAN, Clerk.

STATEMENT FOR JUDGMENT

Statutory Costs $25.00 Printer $173.25

Total $198.25

APPENDIX D

MANDATE

STATE OF MINNESOTA)
) ss.
SUPREME COURT)

THE STATE OF MINNESOTA

To the Honorable Judge and Officers of the District Court within and for the County of Ramsey, Greeting:

D.C. No. 300734*

Whereas, Lately in your Court, in action therein pending, entitled Arthur K. Wurdemann and Wurdemann-Hjelm Corporation, Plaintiffs and Clifford R. Hjelm, David R. Hjelm and The Jesmer Corporation, Defendants* a certain orders were entered therein July 2 and July 10, 1959, from which action of your Court an appeal thereafter was taken to this Court;

And Whereas, The said cause came on to be heard before our Supreme Court, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the orders of the Court below herein appealed from, be, and the same hereby are, in all things affirmed and that judgment be entered accordingly. A copy of the entry of judgment thereupon in this Court is herewith transmitted and made part of this remittitur.

Now Therefore, This MANDATE is to you directed and certified, to inform you of these proceedings had in our Supreme Court, in said hereinbefore mentioned cause, and the same is hereby and herewith REMANDED to your Court for such other or further record and proceedings therein as may be by law necessary, just and proper, under and by virtue of the said order herein made.

Witness, The Honorable ROGER L. DELL, Chief Justice of the Supreme Court aforesaid, and the seal of said Court at St. Paul, this May 31, 1960.

/s/ MAE SHERMAN
Clerk of the Supreme Court.

(*Separate Mandates in each of Cases involved in appeal, identical to above except for title and case number.)

APPENDIX B

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

No. 300734

Arthur K. Wurdemann and Wurdemann-Hjelm Corporation,
Plaintiffs

against

Clifford R. Hjelm, David R. Hjelm and The Jesmer Corporation,
Defendants

Pursuant to the Partial Findings of Fact, Partial Conclusions of Law, Order for Judgment and Memorandum—Hachey, J., dated and filed on the 4th day of December, 1958, and Judgment—Hachey, J., dated and filed on the 7th day of June, 1960,

Now, on motion of Cummins, Cummins, Hammond, Cummins and O'Brien, said Attorneys, IT IS HEREBY ADJUDGED that the Plaintiffs herein recover nothing of said Defendant The Jesmer Corporation, a Minnesota corporation, and that said defendant have judgment in its favor against the Plaintiffs herein for the sum of No Dollars damages with Seventeen and no/100 Dollars costs and disbursements, in all amounting to $17.00.

Signed this 13th day of June, A.D. 1960.

E. J. FITZGERALD, Clerk
By /s/ F. L. WESTON
Deputy Clerk.

(Docketed 6-13-60, 11:35 A.M.)

(Similar judgments entered in each of cases involved in appeal, except for amount of costs.)

APPENDIX F

STATE OF MINNESOTA

SUPREME COURT

No. 37916

Arthur K. Wurdemann, et al.,

Appellants

vs.

The Jesmer Corporation, et al.,

Respondents

CERTIFICATE OF CLERK, SUPREME COURT OF STATE OF MINNESOTA, TO RECORD AND EXHIBITS CERTIFIED UNDER RULE 21 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, MAE SHERMAN, as Clerk of the Supreme Court of the State of Minnesota, do hereby certify that the following items, herewith enclosed, constitute the entire record of the above entitled cause in said State of Minnesota Supreme Court:

(Description omitted)

and that the following items, herewith enclosed, constitute all of the exhibits before said State of Minnesota Supreme Court in the above entitled cause:

(Description omitted)

all of the above made pursuant to the request of counsel for the Appellants, and certified under Rule 21 of the Revised Rules of the Supreme Court of the United States.

ATTEST my hand and the seal of the Supreme Court of the State of Minnesota, at the City of Saint Paul, in the State of Minnesota, this 31st day of August, 1960.

(SEAL) /s/ MAE SHERMAN